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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WERTHEIM, LLC,

Plaintiff and Appellant,

v.

THE BAR PLAN MUTUAL  
INSURANCE COMPANY,

Defendant and Respondent.

B268539

(Los Angeles County  
Super. Ct. No. BC535737)

APPEAL from a judgment of the Superior Court of Los Angeles County, Elizabeth R. Feffer, Judge. Affirmed as modified.

Howard Posner; The Newell Law Firm and Felton T. Newell; The Law Offices of F. Jay Rahimi and F. Jay Rahimi, for Plaintiff and Appellant.

Diem Law and Robin L. Diem for Defendant and Respondent.

Plaintiff and appellant Wertheim, LLC (plaintiff) obtained a money judgment against defendant Currency Corp. (defendant). Defendant obtained a bond from The Bar Plan Mutual Insurance Company (Insurer) to forestall collection on the judgment while defendant appealed it. Plaintiff prevailed on appeal and later sued Insurer to recoup the sum plaintiff believed it was owed in connection with the judgment. After an initial spate of litigation activity, Insurer moved to deposit the bond proceeds with the trial court and be discharged from liability, as permitted by certain provisions of the Code of Civil Procedure. The trial court granted the motion and dismissed Insurer as a defendant. Insurer then sought an order compelling plaintiff to pay all of its attorney fees, and that brings us to the question presented: did the trial court abuse its discretion in awarding Insurer attorney fees (to be paid out of the deposited bond proceeds) for all work related to the appeal bond, or should the fee award have been limited solely to a reasonable amount to cover the filing of a motion to deposit the contested funds with the court? For reasons we shall explain, we affirm the attorney fee award except as to a small portion of fees that were not recoverable.

## I. BACKGROUND

### A. *The Initial Judgment, the Appeal Thereof, and Initial Efforts to Collect on the Appeal Bond*

The details of the initial action between plaintiff and defendant are not important to the question we confront. What is important is that plaintiff prevailed in the lawsuit and initially obtained a judgment of \$38,554.48 against defendant. Just over eight months later, the trial court amended the judgment to include costs and attorney fees, bringing the total to \$190,718.48.

When the parties took cross-appeals from the judgment, defendant obtained from Insurer an “Undertaking on Appeal and to Stay Execution Under Section 917.1 C.C.P.” (the Appeal Bond) in the amount of \$286,078. The Appeal Bond exceeded the amount of the judgment entered in the initial action because it was intended to cover additional costs—most significantly, interest on the judgment—that would accrue while the appeal proceeded. In May 2012, the Court of Appeal affirmed the judgment entered in plaintiff’s favor, and the remittitur issued on July 25, 2012.

Well over a year later, in November 2013, plaintiff submitted a written demand to Insurer requesting payment of \$275,000.37, the amount it contended was necessary to satisfy the judgment. Aware of the demand, defendant wrote to Insurer and protested the release of any Appeal Bond funds on the ground that plaintiff’s calculation of the amount due was “greatly exaggerated and completely incorrect.” In light of the disagreement regarding the amount due, Insurer wrote to both parties to inform them it would need a court order setting forth the correct amount to be paid before it could release any funds. Insurer also told the parties it was aware they were working to come to some agreement as to the amount to be paid, and that if no agreement could be reached, it would retain counsel to “interplead the funds into the court, and let the court determine who should be paid, and how much.”

The parties came to no mutual agreement. Instead, plaintiff applied ex parte to have the trial judge in the original action enforce liability on the Appeal Bond. Defendant opposed the motion, arguing plaintiff had erred in calculating interest on the full \$190,718.48 amount as of the date the judgment was first

entered rather than calculating interest so as to account for the fact that the bulk of the money judgment was only awarded eight months thereafter, when the court entered the amended judgment. The trial judge denied plaintiff's motion because it was untimely under Code of Civil Procedure section 996.440,<sup>1</sup> which permits a party to move to enforce liability on a bond in the original action only if the motion is made within a year after any appeal is finally determined. In its order denying plaintiff's application, the trial judge also stated that, "[t]o the extent it seeks to confirm the [amount] of the judgment, [plaintiff's application] is incorrect because it seeks to compute interest or costs and attorneys fees back to [the date of the original judgment], when those sums were awarded much later."

During the time that plaintiff's application to enforce liability on the Appeal Bond was pending, Insurer had attempted to deposit the full amount of the Appeal Bond, \$286,078, with the Clerk of the Los Angeles Superior Court for disbursement "as the Court sees fit." But the Clerk returned the check transmitted by Insurer, explaining deposit of an appeal bond "would require a Court Order 'Deposit in Lieu of Appeal Bond.'"

*B. Plaintiff Sues to Collect, and Insurer Eventually Deposits the Proceeds with the Court and Is Discharged from Liability*

With the trial judge having rejected plaintiff's application to enforce liability on the Appeal Bond, and with the funds still not deposited with the superior court, plaintiff in February 2014

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<sup>1</sup> Undesignated statutory references that follow are to the Code of Civil Procedure.

filed a new lawsuit against Insurer and defendant pursuant to section 996.430, which permits liability on a bond to be enforced by a civil action against the principal and the surety. The sole cause of action alleged the sum of \$269,425.89 (with interest continuing to accrue at 10% per annum) was past due and owing. The prayer for relief sought judgment in that amount and also attorney fees and costs of suit.<sup>2</sup>

One or both of the defendants filed a demurrer and a motion to strike,<sup>3</sup> and plaintiff subsequently filed a first amended complaint in June 2014. The amended complaint was identical to the original in most respects, but it included updated figures with respect to the amount plaintiff contended was due and owing as of the day before the filing of the amended complaint: \$280,120.87, with interest continuing to accrue at \$52.25 per day. Like the original complaint, the first amended complaint prayed for attorney fees and costs of suit in addition to this amount.

Not long after filing the amended complaint, plaintiff filed a motion for summary adjudication that sought, among other things, a court order that the amount due on the judgment as of

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<sup>2</sup> The complaint sought attorney fees pursuant to section 996.480. Subdivision (a)(2) of that section states: “If the beneficiary makes a claim for payment on a bond given in an action or proceeding after the liability of the principal is so established and the surety fails to make payment, the surety is liable for costs incurred in obtaining a judgment against the surety, including a reasonable attorney’s fee . . . .”

<sup>3</sup> The same law firm represented both defendant and Insurer, and the pleadings are not included in the appellate record. We rely on a docket case summary sheet included in the record to conclude a demurrer and motion to strike were filed.

the date of the filing of the motion, October 3, 2014, was \$291,668.12, plus interest accruing at \$52.25 a day. The summary adjudication motion was the first court filing to assert that plaintiff's demand—excluding undetermined costs and attorney fees—exceeded the \$286,078 value of the Appeal Bond. Insurer opposed the motion, and the court denied it at a hearing in January 2015, finding the issues raised were not subject to summary adjudication.

About a month later, Insurer filed a motion pursuant to section 386.5, which allows a defendant holding money in which it holds no interest to apply to a court for an order discharging it from liability and dismissing it from the action upon deposit of the funds.<sup>4</sup> Plaintiff opposed the motion, arguing the amount of the judgment (including accrued interest) exceeded the amount of the Appeal Bond and asserting Insurer was attempting to evade its full liability.

The trial court heard Insurer's deposit and discharge motion in May 2015. At the same hearing, the court apparently

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<sup>4</sup> Section 386.5 provides: "Where the only relief sought against one of the defendants is the payment of a stated amount of money alleged to be wrongfully withheld, such defendant may, upon affidavit that he is a mere stakeholder with no interest in the amount or any portion thereof and that conflicting demands have been made upon him for the amount by parties to the action, upon notice to such parties, apply to the court for an order discharging him from liability and dismissing him from the action on his depositing with the clerk of the court the amount in dispute and the court may, in its discretion, make such order." Throughout the remainder of this opinion, we refer to a motion brought under section 386.5 as a "deposit and discharge" motion.

also heard a motion filed by plaintiff for attorney fees and costs.<sup>5</sup> The trial court denied the discharge and deposit motion without prejudice and denied plaintiff's motion for attorney fees and costs in its entirety.

The trial court thereafter issued an order to show cause why it should not vacate its earlier decision to deny Insurer's deposit and discharge motion. Insurer then filed a renewed deposit and discharge motion asking the court to dismiss it from the litigation with prejudice. The renewed motion, accompanied by a declaration from counsel, set forth Insurer's understanding of what prompted the trial court to issue the order to show cause: "[T]he Court subsequently invited [Insurer] to renew its motion after [plaintiff] conceded that the amount in dispute, as per its original Complaint and First Amended Complaint, was less than the amount of the Undertaking. Notably, [plaintiff's] counsel . . . stated in open court that the amount in controversy was actually \$250,000—\$38,000 less than the amount of the Undertaking."<sup>6</sup>

Plaintiff opposed Insurer's renewed deposit and discharge motion, again asserting Insurer's liability exceeded the amount of

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<sup>5</sup> There is no transcript or minute order of the hearing included in the record. Attorneys for Insurer and defendant, however, gave notice of the court's ruling at the hearing, and this document is included in the record. Plaintiff's motion for attorney fees is not included in the appellate record, but Insurer's deposit and discharge motion describes the motion as seeking almost \$123,000 in attorney fees.

<sup>6</sup> No transcript of the case management conference during which plaintiff's counsel is alleged to have made this statement is included in the record.

the Appeal Bond, among other reasons. At a hearing in September 2015, the trial court granted Insurer’s motion, and ordered it to deposit the Appeal Bond proceeds no later than October 16, 2015. The trial court further found plaintiff was “collaterally estopped from pursuing” Insurer in this action because plaintiff’s demand for interest on the full sum of the originally entered judgment had been ruled “improper” by the trial judge in the first action. Having so found, the trial court ordered Insurer discharged from liability and dismissed from the case—reserving the issue of whether Insurer was entitled to attorney fees (the issue we confront on appeal) for later decision.<sup>7</sup>

*C. At an Unreported Hearing, the Court Awards Insurer Attorney Fees in the Full Amount Requested*

Insurer deposited the Appeal Bond proceeds with the court and filed a motion to recover its attorney fees and costs. Insurer made the motion pursuant to section 386.6, which (as we will describe in greater detail) gives courts discretion to award costs and attorney fees to a party who pursues the deposit and discharge procedure provided by section 386.5.

Insurer’s motion sought attorney fees and costs for all of its attorneys’ invoiced work. The amount included fees for attorney work that preceded the filing of the lawsuit (e.g., to oppose plaintiff’s ex parte motion to enforce liability on the Appeal Bond in the original lawsuit), as well as fees incurred in this action before Insurer prepared and filed its deposit and discharge

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<sup>7</sup> The trial court later entered a final judgment and plaintiff has taken a separate appeal from that judgment (case number B270926). That appeal remains pending.

motion. Insurer supported its motion with a declaration from counsel as to the reasonableness of his rates, the hours expended on the various tasks, and copies of his invoices.

Plaintiff opposed the attorney fees motion. Plaintiff argued the relevant statute, section 386.6, permitted an award of attorney fees only for interpleader claims (not a deposit and discharge motion), and plaintiff further contended the court should exercise its discretion to deny fees even if there were a proper statutory basis to award them.

The trial court held a hearing on Insurer's attorney fees motion, and the proceedings were not reported.<sup>8</sup> After hearing argument from counsel, the court granted Insurer's motion for attorney fees and awarded a total sum of \$83,213.05.

A minute order issued in connection with the hearing summarizes, at least in part, the court's rationale in granting fees. The court found the deposit and discharge motion procedure justified an award of attorney fees and rejected plaintiff's argument that Insurer could recover fees only if it filed a cross-complaint in interpleader. The court recognized it had discretion to award fees under section 386.6 and decided to exercise its discretion to award fees based on the manner in which the parties—particularly plaintiff—had litigated the dispute: “[T]he court has already determined that [plaintiff] submitted an improper claim to [Insurer] and [Insurer] required [plaintiff] to either change the amount demanded or seek a court order establishing the amount to be paid under the surety. [Insurer] . . . attempted to deposit the funds with the Court and

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<sup>8</sup> No agreed or settled statement of the proceedings has been made part of the appellate record.

was ultimately successful on September 28, 2015. [Plaintiff's argument] that fees should be denied because [Insurer] wrongfully withheld funds is unpersuasive and inapplicable."

The trial court also addressed whether awarding fees would be improper because the same attorney represented both defendant and Insurer in defending against plaintiff's lawsuit. The court acknowledged section 386.6 provided no basis for an award of attorney fees to defendant, and the court therefore recognized it had discretion to apportion fees. The court, however, declined to apportion any part of the fees claimed by Insurer to defendant (such that they would be excluded from any fee award the court would make) based on its finding that "[t]here appears to be no work performed in this matter for the sole benefit of Currency as a Defendant."

Finally, the trial court calculated the amount of attorney fees due, emphasizing "[defendant] has not provided any evidence to attack the itemized billing provided by [Insurer]." The court found Insurer provided "sufficient evidence of the work incurred in defending this action" and concluded both the hourly rate and the claimed fees were reasonable.

## II. DISCUSSION

Plaintiff asserts the Code of Civil Procedure authorizes a court to award attorney fees only for work immediately necessary to deposit money with the court under section 386.5. Thus, plaintiff argues, the award in this case should have been no greater than \$2,000, the amount plaintiff believes reasonable to prepare and file a deposit and discharge motion. This, however, misreads section 386.6 and prior cases that have considered the contours of a proper attorney fees award. We hold the fees

awarded for work *after* Insurer filed its deposit and discharge motion are undoubtedly proper, and we further conclude plaintiff has not demonstrated, on the record before us, that the trial court abused its discretion in awarding fees *before* the filing of the motion either—except as to a small sum attributable to attorney work that was not performed in this action.

*A. Standard of Review*

The question of whether a statute permits an award of attorney fees is one we review de novo. (*Tri-State, Inc. v. Long Beach Community College Dist.* (2012) 204 Cal.App.4th 224, 227; *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 669 [“[T]he determination of whether the criteria for an award of attorney fees and costs have been met is a question of law”], internal quotation marks and citation omitted.) However, once a reviewing court determines the statute in question would permit an award of fees, the usual abuse of discretion rule applies. (See *Carpenter & Zuckerman v. Cohen* (2011) 195 Cal.App.4th 373, 378; *Salawy v. Ocean Towers Housing Corp.*, *supra*, at p. 669; see also *Gaines v. Fidelity Nat. Title Ins. Co.* (2016) 62 Cal.4th 1081, 1100 [under abuse of discretion standard, trial court’s findings of fact reviewed for substantial evidence and its application of law to facts reversible only if arbitrary or capricious].)

The party challenging an award of attorney fees bears the burden of providing an adequate record to demonstrate error. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) We do not presume error on appeal; rather, the opposite is true: we presume that the court’s attorney fees order is correct unless plaintiff demonstrates otherwise. (*Denham v. Superior Court* (1970) 2

Cal.3d 557, 564 [“A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown”]; *Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1201; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447.)

*B. Analysis*

*1. Scope of attorney fees authorized by section 386.6*

Section 386.6 authorizes a court to award attorney fees to a party who either (1) interpleads money with the court by way of a pleading pursuant to section 386 or (2) files a deposit and discharge motion pursuant to section 386.5. Specifically, section 386.6 provides in relevant part as follows: “A party to an action who follows the procedure set forth in Section 386 or 386.5 may insert in his motion, petition, complaint, or cross complaint a request for allowance of his costs and reasonable attorney fees incurred in such action. In ordering the discharge of such party, the court may, in its discretion, award such party his costs and reasonable attorney fees from the amount in dispute which has been deposited with the court . . . .” (§ 386.6, subd. (a).)

Three features of the statutory text are particularly relevant here. First, an award under section 386.6 may only encompass fees and costs “incurred in such action”—here, plaintiff’s lawsuit that ultimately led Insurer to file the deposit and discharge motion.<sup>9</sup> Second, the attorney fees must be

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<sup>9</sup> The phrase “in such action,” particularly the word “in,” cannot be read too restrictively. It must be true, for example,

“reasonable.”<sup>10</sup> Third, the statute permits an award of fees “[i]n ordering the discharge of such party,” and this language is best read to allow reimbursement of only those attorney fees incurred in connection with depositing the amount in dispute with the court and seeking to be discharged from liability.

Indeed, that is the reasoning of the case upon which plaintiff principally relies, *Sweeney v. McClaran* (1976) 58 Cal.App.3d 824 (*Sweeney*). There, a surety company was named as a defendant in an action to recover employee fringe benefit payments from a contractor named as a co-defendant. (*Id.* at p. 826.) The surety company filed a multi-count cross-complaint, which, as later amended, included one count to interplead funds from a contractor’s license bond. (*Id.* at pp. 826, 830.) The trial court awarded attorney fees to the surety company pursuant to section 386.6, and cross-defendants appealed the order. (*Id.* at pp. 826-827.)

The Court of Appeal held an award of fees under section 386.6 “must be limited to those incurred only in pursuit of the stakeholder’s remedy,” i.e., the interpleader remedy pursued by a party with no interest or stake in the bond funds in question.

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that an attorney’s work in drafting a complaint in interpleader is compensable under section 386.6 even though, technically, that work would not have been done “in” the action because the action does not exist until the interpleader complaint is ultimately filed.

<sup>10</sup> Plaintiff has not challenged the hourly rate or the hours expended by Insurer’s attorneys. There is therefore no dispute that the fees charged by Insurer’s attorneys were reasonable. The only question for us is whether the billed amounts are sufficiently connected to the deposit and discharge statutory procedure.

(*Sweeney, supra*, 58 Cal.App.3d at p. 830; see also § 386.5.) In *Sweeney*, this meant the trial court could only award fees incurred in connection with the interpleader cause of action, but not fees incurred in prosecuting the other three causes of action before the cross-complaint was amended to include an interpleader claim. (*Id.* at p. 830.) As the Court of Appeal held, “the trial court, in its discretion, may allow only such fees as relate solely to the pursuit of the stakeholder remedy of . . . section 386 et seq. (including fees incurred to overcome resistance to the remedy).” (*Id.* at pp. 830-831.)

Our decision in *Southern California Gas Co. v. Flannery* (2014) 232 Cal.App.4th 477 (*Flannery*) supports the view that a trial court has discretion to award a wide variety of litigation expenses under section 386.6 so long as the court finds they are sufficiently connected to the process of depositing contested funds with the court and seeking discharge from liability. We stated in *Flannery* that the trial court did not abuse its discretion in awarding costs and attorney fees under section 386.6 to the interpleading plaintiff for their attorneys’ work “in connection with preparing the complaint in interpleader, attending various hearings and the mandatory settlement conference, opposing defendant’s Anti-SLAPP Motion and preparing the Discharge Motion.” (*Id.* at p. 492.)

2.     *With one caveat, plaintiff has not demonstrated the trial court abused its discretion in awarding fees*

Having established section 386.6 gives a trial court discretion to award attorney fees for work related to depositing an amount in dispute with the court and seeking to be discharged

from liability, we review the record to determine if plaintiff has shown the trial court's fee award here was an abuse of that discretion. The issue is best analyzed by separating the fee award into two categories: (1) fees for work in filing the deposit and discharge motion and all work done thereafter (the post-motion work), and (2) fees for litigation activities before Insurer first filed its deposit and discharge motion (the pre-motion work). Attorney billings in the first category are clearly compensable, and we have no adequate basis to conclude the trial court abused its discretion in ordering compensation for the attorney billings in the second category—except for \$9,994.76 in charges attributable to work wholly separate from this lawsuit.

*a. post-motion work*

By plaintiff's estimation, close to \$50,000 of the costs and attorneys fees awarded to Insurer were incurred on or after February 11, 2015, which is the date plaintiff identifies as the first instance where Insurer's attorney billing records make reference to work related to the filing of a deposit and discharge motion. Not all these post-February 11, 2015, fees were incurred strictly in connection with the filing of the deposit and discharge motion. Nevertheless, as both *Flannery* and *Sweeney* explain, the trial court had discretion to order reimbursement for a wide range of tasks (e.g., attendance at settlement conferences) in overcoming resistance to the deposit and discharge motion, which necessarily includes work to obtain a ruling discharging Insurer from liability. (*Flannery, supra*, 232 Cal.App.4th at p. 492; *Sweeney, supra*, 58 Cal.App.3d at p. 830.) The trial court was therefore well within its discretion in awarding attorney fees for the post-motion work.

*b. pre-motion work*

The remainder of the fees awarded by the court were for litigation activities that occurred before Insurer prepared and filed the (first) deposit and discharge motion. Plaintiff calculates this pre-motion work amounts to \$34,464.41 of the fees awarded. The question of whether the fees for this pre-motion work were properly included in the trial court's fee award is not quite as straightforward.

We reject plaintiff's argument that work done prior to the filing of a deposit and discharge motion can *never* be compensable under section 386.6. The remedy under section 386.5 has two components. One is the deposit of the contested funds with the trial court, but the other is a discharge from liability in the action in question. In a mine-run interpleader or section 386.5 case, this second component will be uncontroversial—the size of the pot of money is taken as a given and the only question is who is entitled to it. But that is not true here. In this case, one of the issues plaintiff's lawsuit sought to resolve—really, *the* issue—is the amount of money to which plaintiff was properly entitled in connection with the original money judgment. If plaintiff's litigation position raised the possibility that Insurer's liability exceeded the amount of the Appeal Bond, the trial court would be within its discretion to conclude Insurer's pre-motion work to defend against plaintiff's claims in the lawsuit (e.g., filing a demurrer and motion to strike) were efforts to ensure there would be no bar to discharging Insurer from liability. In that scenario, attorney time would be compensable under section

386.6 regardless of whether the work preceded the actual filing of a deposit and discharge motion.<sup>11</sup>

Because, at least in some circumstances, work prior to the filing of a deposit and discharge motion can properly be included in section 386.6 attorney fees award, the record must demonstrate the trial court here abused its discretion in awarding such fees to warrant reversal. The record does not so demonstrate. As we have said, we presume the trial court's judgment is correct and plaintiff, as the party challenging an award of attorney fees, bears the burden of providing an adequate record to demonstrate error. (*Maria P. v. Riles, supra*, 43 Cal.3d at p. 1295; *Vo v. Las Virgenes Municipal Water Dist., supra*, 79 Cal.App.4th at p. 448; *Great Western Bank v. Converse Consultants, Inc.* (1997) 58 Cal.App.4th 609, 615 [record inadequate to decide whether trial court abused its discretion in ruling on motion to tax costs because no reporter's transcript of the hearing on the motion to tax costs included in the record].) The appellate record here includes no transcripts of the relevant hearings—including the hearing on Insurer's attorney fees motion—and several other pertinent trial court filings we have described are missing as well. With one exception, we cannot

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<sup>11</sup> *Sweeney* does not hold to the contrary. The opinion in that case does criticize the trial court's attorney fees award for including fees before the cross-complaint was amended to include an interpleader cause of action. (*Sweeney, supra*, 58 Cal.App.3d at p. 830.) But that is because the cross-complaint at that time included other causes of action separate from the interpleader claim. Here, of course, Insurer did not file a cross-complaint and plaintiff's action included only one cause of action to enforce liability on the Appeal Bond.

conclude on the record before us that plaintiff has affirmatively demonstrated the trial court abused its discretion when it included fees for the pre-motion work in its attorney fees award—particularly in light of indications in the record that plaintiff’s counsel may have conceded certain matters concerning the amount actually in controversy. (See *ante* at p. 7.)<sup>12</sup>

Having so held, there is one aspect in which the record before us *is* sufficient to demonstrate error. The attorney billing invoices submitted by Insurer include \$9,994.76 in fees for work done in opposing plaintiff’s *ex parte* application to enforce liability on the Appeal Bond in the original action—weeks before plaintiff filed this lawsuit. Fees for this work are not compensable under section 386.6 because the fees were not “incurred in [this] action.” (§ 386.6, subd. (a).) Even recognizing that “in” should not be read restrictively, attorney work in opposing an *ex parte* application in a separate case cannot be said to be related to a deposit and discharge motion filed in what was then a non-existent action by plaintiff.

The billing invoices in the record are sufficiently clear that we see no need to remand the matter to the trial court for a redetermination of the total fee amount. Rather, we simply order the judgment modified to reduce the total award by \$9,994.76 and affirm the judgment as modified.

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<sup>12</sup> Plaintiff also objects to the trial court’s refusal to apportion fees, arguing defendant’s interest in the litigation was distinct from Insurer’s interest. This argument also fails in light of the inadequacy of the record.

## DISPOSITION

The trial court's attorney fees order is affirmed as modified, resulting in a total attorney fees award to The Bar Plan Mutual Insurance Company in the amount of \$73,218.29. The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KUMAR, J.<sup>\*</sup>

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<sup>\*</sup> Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.